IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 512

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of Yokohama Specie Bank, Ltd.,

Petitioner,

against

EUGENE T. SINGER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Your petitioner, ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of the Yokohama Specie Bank, Ltd., prays that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York in the within action dated April 15, 1949 [R. 539].*

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* References in brackets are to pages of the Record on Appeal.

Opinions Below.

The instant case was twice appealed to the Court of Appeals. Opinions of that court appear in 293 N. Y. 542 [R. 525] (motion for reargument denied 294 N. Y. 689) and in 299 N. Y. 113 [R. 530] (motion for reargument denied, 300 N. Y. 459 [R. 586]). An amendment of the remittitur appears in 299 N. Y. 791 [R. 541].

The Supreme Court, County of New York, also rendered opinions on both appeals. Neither was officially reported, but unofficial reports appear in 47 N. Y. Supp. 2d 881 and in the New York Law Journal of February 20, 1947, page 695, [R. 508]. No opinion was rendered by the Appellate Division on either appeal—see 267 App. Div. 980 and 273 App. Div. 996.

Question Presented.

The question presented is whether Presidential Executive Order No. 8389 (the Freezing Order), issued pursuant to Section 5(b) of the Trading with the Enemy Act of October 6, 1917, and the rules and regulations issued pursuant thereto,* prevent the accrual or creation of a claim predicated upon a transaction prohibited by such Order, rules and regulations and render such claim void.

Plaintiff sued to establish a claim against the New York Agency of a foreign banking corporation in liquidation. The Court of Appeals held:

(a) that the claim asserted by plaintiff rests upon a transaction prohibited by the provisions of Execu-

* The issuance of this Order and of the regulations and general rulings issued thereunder were approved and confirmed by the Joint Resolution of both houses of Congress of May 7, 1940 (App., p. 25) and by Section 302 of the First War Powers Act of 1941 (App., p. 27).

tive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto,

(b) that such Order, rules and regulations do not prevent the accrual or creation of such claim or render it void, but merely prevent payment thereof until an appropriate federal license is obtained, and

(c) that no such license has been issued.

Your petitioner seeks review of the second of these holdings.

Jurisdiction of this Court.

The judgment of the Court of Appeals was rendered on April 15, 1949 [R. 539]. A motion for reargument was made on July 8, 1949 [R. 543]. This motion, after due deliberation upon duly submitted papers, was denied on October 6, 1949 [R. 586]. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. Section 1257.

The federal question as to which review is sought was presented to and necessarily passed upon by the New York courts. The provisions of the Executive Order were pleaded as a complete and separate defense in the answer of the Superintendent [R. 19-21] and on the trial of the action a conclusion of law based upon this defense was proposed to and refused by the Trial Court [R. 83]. This defense was briefed and argued to the Supreme Court, the Appellate Division and the Court of Appeals on both appeals by all of the parties as well as by the federal government as *amicus curiae*. The motion for reargument was devoted exclusively to this question [R. 544].

While the opinions of the Court of Appeals deal with the question somewhat indirectly, the amended remittitur is specific in stating that the question was presented to

and necessarily passed upon by the court. It reads in part as follows [R. 542]:

> "A federal question was presented and necessarily passed upon by this court, viz: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained, and that the documents in evidence do not constitute such license."

Statutes Involved.

The relevant provisions of Section 5 (b) of the Trading with the Enemy Act, as amended, and of Executive Order No. 8389, as amended, and of the rules and regulations issued pursuant thereto, are set out in the appendix *infra*, pp. 25 to 41. The relevant provisions of the Banking Law of the State of New York are set forth in the appendix *infra*, at p. 40.

Summary Statement of the Matter Involved.

Synopsis of Facts.

This action was brought to establish plaintiff's right to participate in the liquidation of the New York Agency of the Yokohama Specie Bank, Ltd. The Yokohama Specie Bank, Ltd., was a Japanese banking corporation with its head office in Yokohama. Prior to the war this corporation, pursuant to license granted by the Superintendent of Banks, maintained an agency in the City of New York which was authorized to conduct a limited banking business in that

state [Complaint, R. 9; Ex. Z, 477 (332)].* On the outbreak of the war, the Superintendent, pursuant to Section 606 (4) of the Banking Law, took possession of this New York Agency for the purpose of liquidation [Complaint, R. 11; Ex. EE, R. 489 (334)].

Plaintiff claims that he became a creditor of the agency on August 29, 1941 as a result of an attempted transfer of funds from Japan to New York. On that date the Yokohama office of the Standard-Vacuum Oil Company (plaintiff's assignor) directed the Yokohama office of the bank to debit Standard's account at that office with the sum of yen 2,378,928 and to remit the dollar equivalent thereof to Standard in New York [Stipulation, R. 503]. The Yokohama office of the bank thereupon made the indicated debit to Standard's account and credited the dollar account of the New York Agency on its books with $557,561.25, the dollar equivalent thereof. At the same time it cabled the agency to pay the said sum of $557,561.25 to Standard in New York [Stipulation, R. 503; Ex. 11, 371 (182); Ex. S, R. 450 (265); Ex. 7, R. 358 (119)], thereby authorizing the agency, upon making the payment, to debit the amount thereof against the dollar account maintained by the Yokohama office of the bank with the New York Agency [R. 245-6, 323].

Long prior to this transaction, however, the President of the United States had promulgated Executive Order No. 8389 prohibiting certain transactions by, or on behalf of, or pursuant to the direction of, or involving the property of, certain foreign countries and their nationals. On July 26, 1941, more than a month before the attempted remittance to New York the provisions of this Executive Order were made applicable to Japan and its nationals [Executive

* Parentheses within the brackets refer to pages of the Record on Appeal at which the exhibits referred to were offered in evidence.

Order No. 8832 (6 F. R. 3715)] (App., p. 26). Moreover on July 26, 1941, a representative of the United States Treasury Department had been placed in charge of the agency [R. 279-286, 252-4, 258-9, 301-2]. A license from the Treasury Department and the consent of the Treasury Supervisor were required before the Agency could enter into transactions covered by the Order. [R. 281-2, 294-5, 301-2, 292, 252-4, 284, 258-9, 263, 274, 326].

Accordingly the agency neither debited the account of its Yokohama office nor made payment to Standard of the sum specified in the cable of August 29, 1941, but instead advised Standard orally and in writing that the instructions had been received and that upon the issuance of a license payment would be made [Ex. 7, R. 358 (119); R. 193, 208-14].

Upon being notified of this Standard on the same day filed an application with the Federal Reserve Bank of New York, directed to the Secretary of the Treasury, for an appropriate license under the Executive Order [Ex. F, R. 417-23 (155)]. On October 15, 1941, the Federal Reserve Bank notified Standard that its application for a license involved a question of basic policy which was then receiving the active consideration of the Treasury Department, and that Standard would be promptly notified when a decision had been reached [Ex. G, R. 424 (156)]. Thereafter on December 29, 1941, a supplemental application for a license was filed by Standard [Ex. E, R. 412-6 (155)]. Both the original and supplemental applications were subsequently denied by the Treasury Department [Ex. H and I, R. 425-6 (156)]. No entry was ever made on any of the books of the agency with respect to the cable instructions [Ex. EE, R. 489 (334)] and payment was never effected.

On December 8, 1941, the Superintendent took possession of the agency for the purpose of liquidation [Complaint, Par. 13, R. 11; Ex. EE, R. 489 (334)]. On December 19,

1941, he received from the Treasury Department a license authorizing him to pay administration expenses out of the blocked property of the Agency [Ex. AA, R. 479 (333)]. On January 14, 1942, he obtained a license authorizing him to liquidate the assets and pay the creditors of the agency, subject to the stipulation, among others, that transactions involving blocked nationals other than the agency could be effected only as authorized by a general or specific license [Ex. 15, R. 375 (228)]. This license was revoked by a letter from the Treasury Department dated October 29, 1942, which in terms authorized the Superintendent, so far as the Treasury Department was concerned, on and after such date to engage in any transaction which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country, and called attention to the possible applicability of the rules and regulations of the Alien Property Custodian ([Ex. 17, R. 380 (229)].

Shortly before the issuance of the letter of October 29, 1942, the Alien Property Custodian, without vesting the property of the Agency, undertook the supervision of its liquidation by the Superintendent [Ex. CC, R. 482 (333)]. He instructed the Superintendent to continue the liquidation and to submit claims to him prior to payment [Ex. 16, R. 378 (228)].

Subsequent thereto and on February 15, 1943, the Custodian vested title to the excess proceeds of the assets in the hands of the Superintendent remaining after the payment by the Superintendent of the creditors entitled to share in the liquidation of the New York Agency [Ex. DD, R. 485 (333)]. On August 25, 1942, the Superintendent called for the filing of claims [Complaint, Par. 34, R. 12] and on November 21, 1942, Standard filed the proof of claim upon which this action is based [Ex. 8, R. 358-68,

(119)]. This claim was rejected by the Superintendent on February 11, 1943 [Ex. 8, R. 369 (119)]. On August 10, 1943, Standard assigned its claim to plaintiff [Ex. 9, R. 370 (120)] retaining, however, all beneficial interest therein [Ex. J, R. 431 (156)] and on the same day this action was commenced.

Prior Proceedings

Section 606 (4) of the Banking Law of the State of New York [App. p. 40] provides that the only creditors of a foreign banking corporation who may participate in the liquidation of its New York assets are those whose claims arise out of a transaction with its New York Agency.* After such creditors (who are designated as "preferred") have been paid, the surplus remaining must be transmitted by the Superintendent to the principal office or domiciliary liquidator of the foreign corporation. Creditors of the corporation whose claims do not arise out of transactions with its agency must look for payment of their claims to such principal office or domiciliary liquidator (*Orvis* v. *Bell*, 294 N. Y. 844, aff'g. without opinion 268 App. Div. 851, aff'g. without opinion 182 Misc. 616).** In order for a claim to fall within the statutory preference the transaction out of which it arose must be such as to give rise to an enforcible obligation against the agency [R. 528].

The question to be determined, therefore, was whether the New York Agency had come under an enforcible obli-

* The statute also provides that creditors whose names appear as creditors on the books of the Agency may participate in its liquidation. This provision, however, is not relevant to the instant case for plaintiff's name did not appear as a creditor on the books of the Agency [R. 44].

** In the instant case, as indicated above, the Alien Property Custodian has vested the surplus remaining after the payment of the "preferred" creditors [Ex. DD, R. 485 (333)].

gation to make the payment to plaintiff and, particularly, whether the prohibitions of the federal freezing regulations served to prevent the creation of such an obligation. The Superintendent maintained that the attempted remission of funds from Japan to New York fell squarely within the provisions of the Executive Order concerning transactions in foreign exchange and transfers of credit and payments by and to banking institutions, and therefore could not serve as the basis of an enforcible legal obligation. He further maintained that the transaction of August 29, 1941, constituted an attempted transfer of an interest in blocked property within the meaning of General Ruling No. 12 (App. p. 30). This Ruling declares that all such transfers after the effective date of the Order are "null and void" and cannot serve as a "basis for the assertion or recognition of any right, remedy, power or privilege with respect to" such property.

In 1944 the Superintendent moved for summary judgment. The motion was granted by the Supreme Court and the Appellate Division, but the judgments of these courts were reversed by the Court of Appeals. That Court held that the facts recited in the papers before it, if true, "served to create an enforcible legal obligation by the New York Agency" to make a payment to Standard [R. 528], and thereby constituted plaintiff a creditor of the agency [R. 525]. The court evidently treated the transaction in suit as if a cable transfer of credit from Japan to New York had been effected (notwithstanding the prohibitions of the Order), thus putting the agency in funds to make payment to Standard upon procurement of an appropriate federal license. The court stated [R. 528]:

> "When on August 27, 1941, Yokohama Specie at its home office in Japan accepted funds from Standard it thereby became indebted to Standard in the amount

> then deposited. When on August 29, 1941, following instructions from Standard, and acting under its New York license, Yokohama Specie transmitted those funds by cable from Japan to its New York Agency, we think the consequent oral and written communications, to which reference has been made—by which the New York Agency advised Standard that it was in funds from its Yokohama home office which it was instructed to pay to Standard—served to create an enforcible legal obligation by the New York Agency to make such payment."

The court rejected the argument that the provisions of the Executive Order prevented the creation of the obligation and held that they served merely to prevent payment until an appropriate license had been obtained. This holding appears somewhat obliquely from its statement that [R. 528]:

> "The fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay. (See United States Treasury Department, General Ruling No. 12 (4) under Executive Order No. 8389 as amended; also *Feuchtwanger* v. *Central Hanover Bank*, 288 N. Y. 342.)
>
> "* * * Any payment of funds by Yokohama Specie's New York Agency to Standard as an incident of such transaction is subject to the provisions of Executive Order No. 8389, as amended."

The case was thereupon remitted to the Supreme Court for trial [R. 529].

The Trial Court, following the decision of the Court of Appeals, held that plaintiff had established his right to

participate in the liquidation of the agency. In addition that court held that payment of plaintiff's claim had been licensed by the Treasury Department letter of October 29, 1942 referred to above at page 7* This judgment was affirmed by the Appellate Division in all respects.

The Court of Appeals, however, reversed upon the question of whether payment had been licensed. It explicitly held that plaintiff's claim was based upon a prohibited transaction and that neither the letter of October 29, 1942 nor the other documents in evidence authorized payment of the claim in suit. It nevertheless held that plaintiff's claim was an accrued and established one and, was therefore entitled to recognition, and thus it reaffirmed, without expressly so stating, its holding on the first appeal as to the effect of an unlicensed transaction. Its holding in this regard was stated in precise form for the first time in the amended remittitur quoted above at page 4.

Specification of Errors to be Urged.

The Court of Appeals erred

(1) in holding that the prohibitions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto do not prevent the accrual or creation of an obligation predicated upon a prohibited transaction or render such transaction void, but merely prevent payment of such an obligation until an appropriate license is obtained, and

(2) in failing to direct the dismissal of the complaint.

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* This holding is not explicitly made but appears from the fact that the court refused to condition the payment of plaintiff's claim upon the procurement of an appropriate federal license and awarded interest to plaintiff upon the principal of its claim from the date of this letter [R. 44, 90].

Reasons for Granting the Writ.

1. The decision of the New York Court of Appeals upon the question presented is in direct conflict with decisions of this Court.

The primary reason for granting a writ of certiorari in this case is that the decision of the New York Court of Appeals is in direct conflict with decisions of this Court.

> *Propper* v. *Clark*, 337 U. S. 472 (1949) [R. 558];
> *McGrath* v. *Manufacturers Trust Company*, U. S. , 94 L. Ed. 10 (1949).

The decision of the Court of Appeals is also in direct conflict with the decisions of numerous federal district and circuit courts.

> *The Kotkas*, 35 F. Supp. 983 (E. D. N. Y., 1940);
> *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii, 1947);
> *Clark* v. *Chase National Bank*, 82 F. Supp. 740, (S. D. N. Y., 1948);
> *Heyden Chemical Corp.* v. *Clark*, 85 F. Supp. 949, (S. D. N. Y., 1948);
> *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 173 F. 2d 71 (C. A. 2d, 1949);
> Cf. *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa., 1948).

Since this conflict is upon a point of federal law it should be resolved in favor of the view set forth in the controlling federal decisions.

> *Propper* v. *Clark*, 337 U. S. 472 (1949) [R. 558, 570].

There is, we believe, no room for doubt as to the existence of this conflict. The New York court held in substance that the only effect of Executive Order No. 8389 was to prevent

payment in consummation of a prohibited transaction. This Court and the other federal courts have held that

> "The language of the order prohibits more than payment. It prohibits transfers of credit". *Propper* v. *Clark* [R. 572].

The arguments presented to the court in the *Singer* and *Propper* cases were strikingly similar. In both cases it was argued (a) that the provisions of the Executive Order did not apply to the transaction in suit, and (b) that even if the Order did apply its needs could be served by a provision against payment without a license.

(a) The first of the foregoing arguments was overruled in the *Propper* case by a holding that both ASCAP and the petitioner were "banking institutions" within the broad definition of that term set forth in Section 5 F of the Order. No problem of similar difficulty is presented in the *Singer* case, for the application of the Executive Order to the transaction in suit is obvious.

The provisions of Section 5 (b) of the Trading with the Enemy Act and of Executive Order No. 8389* were unmis-

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* Section 1 of the Executive Order (App., p. 27) provides:

> "Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:
>
> "A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch or corre-

takably aimed at giving control over the transmission of moneys by means of cable transfers of credit between banking institutions. No clearer example of a "transfer of credit" between a "banking institution within the United States" and a "banking institution outside the United States" could be postulated than that here involved. Cf. *Legniti* v. *Mechanics & Metals National Bank*, 230 N. Y. 415 at 419, *Singer* v. *Yokohama Specie Bank, Ltd.*, 293 N. Y. 542 at 549. Not only were the Yokohama branch of the Yokohama Specie Bank and the New York Agency of that bank "banking institutions" within the meaning of Section 5 F* of the Executive Order, but in addition, Standard's Yokohama and New York offices were also "banking institutions" as defined therein, for they were engaged incidentally in the business of purchasing or selling foreign exchange

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spondent outside the United States, of a banking institution within the United States);

"B. All payments by or to any banking institution within the United States;

"C. All transactions in foreign exchange by any person within the United States;

"D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

"F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."

* The term "banking institution" is defined to include (Section 5 F):

"any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or broker; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate 'banking institution'."

[Exs. 2, 2A, R. 346-9 (109); Ex. 14, R. 374 (189); Exs. 19-26, R. 382-405 (502); R. 98-9, 129-30]. In addition, each of such offices of Standard "held credits for others" within the meaning of such section of the Order as construed by this Court in the *Propper* case [Ex. 3, R. 350-1 (114); Ex. 5, R. 354-5 (116); Exs. B, C, D, R. 407-11 (146); Ex. F, R. 417 (155); Exs. K, L, M, R. 438-43 (217, 221, 222); Exs. II, JJ, R. 498-501 (503); R. 121, 124, 137-8, 143-4, 168-70, 218].

In addition to involving a transfer of credit within the meaning of Section 1 A of the Order the instant case also plainly involved a "transaction in foreign exchange" and a "payment" "by" and "to" a banking institution within the United States within the purview of Sections 1 B and 1 C of the Order. Finally, the transaction of August 29, 1941, involved the creation of an interest in blocked property. See General Ruling 12, pars. 1, 2, 5 (a) (App., p. 30).

The New York court clearly recognized the force of the foregoing assertions and specifically held that the transaction here involved fell within the prohibitions of the Executive Order. It said [R. 531]:

> "A survey of the underlying facts leaves no doubt that plaintiff's claim rests upon a transaction which was subject to the licensing requirements."

and that [R. 536]

> "Since the transfer of funds involved the foreign office of the Yokohama bank and Standard's Japanese office, both nationals of Japan, and was to be performed at the direction of the foreign bank, it was a prohibited transfer * * *."

(b) The second of the arguments mentioned above, however, received a different treatment in the state and federal

courts. The state court held that the prohibitions of the Order did not prevent the transaction in suit from giving rise to [R. 528]—

> "an enforcible legal obligation by the New York Agency to make such payment"

nor prevent the establishment of plaintiff's right to share in the liquidation fund in the hands of the Superintendent upon the basis of an "accrued"* claim. The court directed the entry of judgment against the Superintendent declaring that the amount thereof "shall constitute a preferred claim payable out of the assets of the Yokohama Specie Bank, Ltd." in the possession of the Superintendent [R. 541].

If the opinions of the Court of Appeals left any doubts as to its holding upon this issue, its amended remittitur would lay such doubts to rest. The remittitur states [R. 542]:

> "A federal question was presented and necessarily passed upon by this court, viz: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained. * * *."

In the federal courts, on the other hand, the argument that prohibited transactions may be treated as valid and enforcible insofar as judicial proceedings are concerned and that the only effect of the Executive Order is to prevent consummation of prohibited transactions by payment has been definitively rejected.

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* See opinion in companion petition in the case of *Banque Melkie Iran v. Yokohama Specie Bank, Ltd.*, 299 N. Y. 139 at 144, also appearing in that Record on Appeal at p. 351.

In commenting upon the receiver's argument in the *Propper* case, this Court said [R. 568]:

> "It is the petitioner's contention that a mere freezing order does not prohibit a subsequent judicial order transferring title to blocked assets covered by the previous freezing order. • • • Petitioner's argument is that such a construction would immobilize frozen property until it suits the Custodian's convenience to vest, contrary to the need for protection against transfers of foreign funds. These needs, petitioner says, will be served by the provision against payments to claimants from frozen funds without a license."

In over-ruling these objections this Court stated [R. 569]:

> "The freezing order of June 14, 1941, immobilized the assets covered by its terms so that title to them might not shift from person to person except by license until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected."

and [R. 572]:

> "We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit."

On the basis of such holding this Court in effect abrogated the unequivocal direction of the New York statutes that upon appointment of a receiver title to the New York property of a foreign corporation should vest

in him. This court held that the order of the Supreme Court appointing the receiver, being unlicensed, was totally ineffective to transfer any interest in the property.*

In *McGrath* v. *Manufacturers Trust Co.*, U. S. , 94 L. Ed. 10, this Court reaffirmed its holding as to the effect of the Executive Order by commenting in a footnote as follows:

> "See also, restrictions on assertion, without a federal license, of any right of setoff which did not exist before June 14, 1941. Executive Order No. 8785, §§ 1 A and 1 E, 1 CFR Cum. Supp. 948, and see *Propper* v. *Clark*, 337 U. S. 472."

Other federal decisions have been to the same effect.

> *The Kotkas*, 35 F. Supp. 983 (E. D. N. Y., 1940);
> *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii, 1947);
> *Clark* v. *Chase National Bank*, 82 F. Supp. 740 (S. D. N. Y., 1948);
> *Heyden Chemical Corporation* v. *Clark*, 85 F. Supp. 949 (S. D. N. Y., 1948);
> *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 173 F. 2d 71 (C. A. 2d, 1949);
> Cf. *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa., 1948).

Finally, it should be pointed out that the *Singer* case gave effect to a prohibited transaction not only by permitting the assertion of a claim predicated thereon, but also by permitting a shift in title to blocked property.

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*See generally upon the effects of unlicensed transactions: Berger & Bittker, *Freezing Controls: The Effect of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemporary Problems, 17, 44-9 (1945); Reeves, *Policy of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

When the Superintendent, as statutory receiver, takes possession of the business and property of a banking organization for the purpose of liquidation, the assets of which he takes possession become a trust fund for the benefit of those creditors of the organization who are entitled to share in them. *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 290; *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, 377, 378; *People* v. *Metropolitan Surety Co.*, 205 N. Y. 135, 139. Prior to the close all of the creditors of the organization have rights *in personam* against the banking organization. Subsequent to the close certain creditors of the organization acquire additional rights which constitute rights *in rem* against the assets in the hands of the liquidator. As was stated in *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412:

> "The liability *in personam* of the bank gives rise to a claim *in rem* against the free assets in the hands of the receiver; * * *".

This is particularly true in the case of the liquidation of an agency of a foreign bank, where, under Section 606 of the New York Banking Law, only "preferred" creditors of the corporation are entitled to share in the liquidation fund. (See *supra*, p. 8). The rights of preferred creditors thus created are separate and distinct from their rights against the banking organization as a whole. *Carr* v. *Yokohama Specie Bank*, 272 App. Div. 64, aff'd 297 N. Y. 674; *Suomen Pankki* v. *Bell*, 80 N. Y. Supp. 2d 821.

At the time of the transaction here involved and when the Superintendent took possession all of the property of the agency was blocked, for the agency was a blocked national. In addition the account on the books of the agency in the name of the Yokohama office of the bank (as well as all other debts and property owned or belonging to other

blocked nationals) was blocked by reason of such ownership. The creation of *any* interest in such property was prohibited by the Order.*

The result of the decision of the Court of Appeals makes it perfectly obvious that a shift in title to this blocked property occurred. If the transaction here involved had not occurred plaintiff would have had no claim against the New York Agency or against the Superintendent as statutory receiver and trustee of the assets in liquidation, whereas as a result of such transaction, under the judgment of the Court of Appeals herein, plaintiff acquired a benefi-

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* General Ruling No. 12 (App., p. 30) specifically provides that the *creation* of *any* rights in any kind of blocked property is a prohibited *transfer*. Thus, "transfer" is defined in Section 5 (a) of the Ruling to include:

> "any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to *create*, surrender, release, transfer, or alter, directly or indirectly; *any* right, *remedy*, power, privilege, or interest with respect to *any property* * * *." (Emphasis supplied.)

Section 5 (b) of the Ruling broadly refines "property" to include, among other things, all types of currency, credit, securities, negotiable instruments, as well as "book credits, debts, claims, contracts," and other intangibles such as options, and futures in commodities, and evidences of any of the items specified.

All of the foregoing transfers are specifically prohibited until licensed. Paragraph 1 of the Ruling provides:

> "Any transfer * * * is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer"

and that—

> "no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any *right*, *remedy*, power, or privilege with respect to, or interest in, any property while in a blocked account * * *." (Emphasis supplied.)

cial interest in such assets and a right to participate therein.*

Further discussion of the conflict between the *Singer* and *Propper* decisions is rendered unnecessary by the fact that this Court in the *Propper* case took specific note of the *Singer* case and explicitly disagreed with it. In refusing to follow the decision of the New York Court of Appeals this Court stated that [R. 570]:

> "We assume that the Court of Appeals of New York held in *Singer* v. *Yokohama Specie Bank* that title to blocked assets could pass without license from a statutory receiver to a creditor. As the Trading with the Enemy Act is federal legislation founded on federal constitutional provisions, however, the United States has authority to make all laws necessary and proper for carrying the power into execution. The power to enact carries with it final authority to declare the meaning of the legislation. *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95 * * *. The Trading with the Enemy Act is national in range. The effect of a federal freezing order should be the same on subsequent transfers of title in all states."

Several other federal courts have likewise explicitly refused to follow the *Singer* case. Thus, in *Bernstein* v. *N. V.*

* The extent to which the Court of Appeals has gone in permitting shifts in title to blocked property is shown by the decision of that court in *Leeds* v. *Guaranty Trust Co.*, 297 N. Y. 1019, affirming without opin. 272 App. Div. 909, which affirmed 65 N. Y. Supp. 2d 431. In that case suit was brought upon an unlicensed assignment of property in a blocked account, made by one blocked national to another. The assignor repudiated the assignment and set forth the provisions of the Executive Order as an affirmative defense. Following the *Singer* decision the court struck this defense from the answer as insufficient in law. Compare Press Release No. 34, April 21, 1942 (App., p. 34) and Public Circular No. 31, August 2, 1946 (App., p. 40).

Nederlandsche Amerikaansche, 173 F. 2d 71, the court said (p. 78):

> "The opinion of the New York Court of Appeals in *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726, allowed a suit to proceed to judgment without a license with the qualification, however, that the judgment therein could not be enforced without obtaining one. This decision is not controlling upon a court of the United States construing the meaning and effect of federal regulations issued under a federal statute. We accordingly hold that the appointment of the state receiver and his assertion in the United States District Court of his claim to blocked property must be validated by a license of the Treasury Department if he desires to proceed further."

See also to the same effect:

Clark v. *Chase National Bank, etc.*, 82 F. Supp. 740 at 742;

Clark v. *Propper*, 169 F. 2d 324 at 327.

We submit that the conflict between the New York and federal decisions presents a proper occasion for the issuance of a writ of certiorari in this case.

2. The question presented is one of major importance in the liquidation by the Superintendent of Banks of the State of New York of 11 Japanese and Italian foreign bank agencies where claims totaling well over $1,500,000 have been asserted which are predicated upon unlicensed transactions.

The difference between the federal and state doctrines is by no means a point of mere theoretical interest. The practical consequence of the difference in doctrine is of major importance. Thus, under the decision of the state

court, plaintiff has an "accrued" and "established" claim against the liquidation fund in the hands of the Superintendent. Even though plaintiff's application for a license has twice been refused, there is nothing to prevent him from making a third, fourth or tenth application. Consequently, under the decision of the state court, it would appear that the Superintendent might have to retain a reserve in his hands for this and all claims of like nature in perpetuity, against the possibility that payment of the claim might some day be licensed. By contrast, under the decision of this Court in the *Propper* case, it is clear that plaintiff has no enforcible claim whatsoever against this liquidation and that his action must therefore be dismissed. Upon such dismissal the Superintendent will be free to release the reserves now maintained against these claims and transfer them to the Office of Alien Property as part of the excess proceeds vested by the Custodian. [Ex. DD, R. 485-(333)].

In this connection it must be noted that the question at issue governs the determination of numerous claims other than the one involved in the instant action. The Superintendent at the present time is liquidating the New York Agencies of 11 Japanese and Italian banking corporations. Many claims were presented against these liquidations based upon transactions prohibited by Executive Order No. 8389. The Superintendent has consistently taken the position since the commencement of these liquidations that claims arising out of or based upon unlicensed transactions were not entitled to recognition and accordingly rejected all claims of this nature. At the present time litigation based upon such claims aggregating over $1,500,000 is pending in the courts of New York. If this Court should deny certiorari in the instant case the state courts would no doubt follow the decision of the Court of Appeals and hold all

such claims valid and enforcible and thereby frustrate the declared intent and purpose of the freezing control program to void unlicensed transactions.

We have not here emphasized the extent to which the doctrine of the New York courts frustrates the broader objectives of the freezing control program, for this Court indicated that it was fully aware of such objectives in its decision in the *Propper* case. It may be noted, however, the importance of the *Singer* case to the officials charged with administering that program is testified to by the fact that they have participated as *amicus curiae* in both appeals to the Court of Appeals as well as on the motion for reargument.

Conclusion.

For all of the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, December 28, 1949.

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Appendix.

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal of exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

Appendix.

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

SEC. 5, as amended by the First War Powers Act of 1941, c. 526, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt

with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * * * * *

3. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * * * * * *

4. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8832, June 26, 1941, 6 F. R. 3715:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secre-

fary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarkings of gold or silver coin or bullion or currency by any person within the United States:

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

• • • • • •

(k) June 14, 1941—

• • • • • •

Japan

• • • • • •

SEC. 5.

• • • • • •

E. The term "national" shall include,

• • • • • •

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

• • • • • •

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers

thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or broker; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate "banking institution."

* * * * * *

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application or license shall be final.

* * * * * *

5. General Ruling No. 4, subdivision (18), September 3, 1943, 8 F. R. 12285:

"(18) No license or other authorization issued by or under the direction of the Secretary of the Treasury pursuant to the Order or sections 3(a) or 5(b) of the Trading with the enemy Act, as amended, shall be deemed to authorize or validate any transaction effected prior to the issuance thereof, unless such license or other authorization specifically so provides."

6. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) : transfer after the

effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein liti-

gated: *Provided, however*, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution; or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfilment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however*, That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term

is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession;

and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Provisional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

7. Press Release No. 34, April 21, 1942.

The Treasury Department in a formal statement issued today called attention to the fact that all unlicensed transfers of blocked assets in the United States are void and unenforceable.

General Ruling No. 12, issued by the Secretary of the Treasury, makes clear that unlicensed transfers of blocked assets in violation of the freezing orders, and transfers designed or having the effect of evading such orders, always have been void and unenforceable.

Secretary Morgenthau, commenting on today's general ruling, pointed out that these unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and that today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control.

He also called attention to the provisions of the ruling, making it possible for persons who have been parties to unlicensed transfers of blocked assets to file applications for licenses to validate these transfers.

"The Treasury, of course, wants to be reasonable about this matter," he stated, "we do not propose to allow our regulations, intended for the protection of

our country and the United Nations, to become an instrumentality for defeating their interests or producing unconscionable advantages or unreasonable hardships. These matters can be dealt with by licenses without undue interference with the purposes of freezing control."

Treasury officials pointed out that there are more than seven billion dollars in blocked assets in the United States. The Government's policy on this matter, as reflected in today's formal ruling, has nullified attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis. It has defeated efforts of the Axis to wrest control of such assets away from their lawful owners and hold them in the hopes that in the postwar period it will be possible to realize on such assets if freezing restrictions are lifted. Of equal significance is the fact that it has destroyed any possible black market in neutral countries for blocked assets—one of the ways the Axis would like to be able to obtain the foreign credit necessary to finance imports from neutral countries into Axis territory and also one of the ways the Axis would like to be able to gain the funds necessary to subsidize espionage, sabotage and fifth column activities in the United Nations, Latin America and elsewhere.

Treasury officials explained that based on the evidence of what the Axis was doing with assets of the overrun countries within their physical control, Axis efforts in an operation of this character would follow no single pattern. Rather they would run the gamut from outright duress—assignments at the point of a gun, or with the Gestapo as "witnesses"—through to the more subtle "legal" transfers—the purchase of such blocked assets against payment in local currency obtained as occupation costs or by forced loan from banking institutions in the occupied areas. In these

latter cases the point of the gun would not be leveled at the individual but would be leveled at the central bank and "Quisling" governments who would provide the credit for the Axis to "buy" their country's birthright.

The net effect of such transfers would not vary however, they would be intended to mulct the overrun countries of the very life-blood of any postwar reconstruction, namely, the foreign exchange needed to obtain the goods and services necessary for rebuilding the economies of these countries. Axis war psychology would be benefitted also—by depriving the holders of their title to these assets the Axis would encourage a spirit of defeatism and a willingness to succumb to the German "new order".

Officials also explained that based on the operation of the neutral black market in looted assets physically in the control of the Axis, it was easy to anticipate the type of black market the enemy might try to foster for "blocked assets". This neutral black market operation would be designed to give the Axis immediate returns on blocked assets even though the Axis could not get such assets out from under our freezing regulations. In this case the assets would be assigned or otherwise transferred to neutral speculators at heavy discount in order that the Axis could obtain credit now to buy goods and services in neutral countries and thus assist the war effort. Of course some of these black market operations would be for the obvious purpose of lining the pockets of Axis officialdom as insurance against the day when the Axis is crushed. Neutral speculators would either hold such assignments with the intent of salvaging on them after the war or in the hope of being able to squeeze the blocked assets through the freezing control by one trick or another.

As was pointed out, since freezing control makes null and void or unenforceable all transfers with respect

to blocked assets unless licensed by the Secretary of the Treasury, Axis attempts to gain title to these assets are frustrated and the true owner's interests are protected and he continues to have a valuable stake in a victory by the United Nations.

Commenting upon today's ruling, Secretary Morgenthau stated: "This Government served notice on the world when we froze the assets of Norway and Denmark on April 10, 1940, that we did not intend to permit the Axis to realize any use or benefit from Norwegian and Danish assets in the United States. Since that time we have consistently pursued this policy with respect to every country falling under the Axis yoke. The policy of this Government always has been unequivocal. We will not allow the Axis, directly or indirectly, to gain any interest in the 7 billion dollars in blocked assets in this country. Neither those funds nor any interest in them will be used against the United Nations by the Axis. Neither will they be used as a part of Germany's economic "new order" in Europe or Japan's 'co-prosperity sphere' in the Pacific."

It was emphasized that while freezing control attempted to interfere as little as possible with normal legitimate commercial transactions, still the Government was combatting a menace of sweeping proportions and was compelled to block all corrosive efforts of infiltration through loopholes. Freezing control and the Government's policy is therefore comprehensive and the licensing technique must be freely used to prevent hardship in legitimate cases. Thus, under the freezing orders, more than 80 general licenses have been issued, permitting vast categories of transactions under appropriate safeguards without even filing an application. In addition, more than 400,000 specific licenses also have been issued.

Paragraph (1) of today's general ruling deals with unlicensed transfers made after the effective date of

the freezing orders involving property in blocked accounts. If any such transfer was made after the account was actually blocked, then the transfer is null and void unless licensed. Thus, if a bank blocked the account of a national of Denmark on April 10, 1940, and on June 10, 1940, the national attempted to assign title to the account to a German, the transfer would be null and void unless the Treasury licensed it. On the other hand, if a transfer were made before the account was actually blocked, but attempt was made to enforce it while the account was in fact blocked, the transfer would be unenforceable. By way of example: On July 15, 1941, John Doe, resident in Argentina, assigned his account with an American bank to Richard Roe in the United States. On September 15, 1941, the Treasury instructed the bank to block the account of John Doe as a national of Rumania. After September 15, 1941, the assignment would be unenforceable against John Doe's blocked account unless the transfer were licensed by the Treasury Department.

Paragraph (2) of the general ruling deals with transfers alleged to have been made before the effective date of the freezing orders but involving accounts thereafter blocked. These transfers are unenforceable against blocked accounts unless the person with whom the blocked account was held or maintained had written notice of the transfer or had recognized it in writing prior to the effective date of the Order. Thus, if in the example above, the national of Denmark had assigned the bank account to the German in 1937 and the bank was not notified of the assignment until June 10, 1940, the assignment would be unenforceable against the blocked account unless licensed. If, on the other hand, the bank was notified in writing of the assignment before April 10, 1940, then the assignment is enforceable against the blocked account (but, of course, payment from the blocked account could only be made pursuant to Treasury license).

Appendix.

Treasury officials pointed out that the policy behind paragraph (2) of the general ruling was understandable. If the general ruling had been merely prospective in operation, it would be easy for Axis agents to validate transfers obtained under duress by the subterfuge of dating them prior to the effective date of the Executive Order. This would, of course, defeat one of the major purposes of freezing control. Officials pointed out that in those cases where notice of the transfer was given to the person maintaining the account in this country and where the transfer had been accepted by that person as valid, the provisions of the general ruling are inapplicable since under those circumstances the notice is an adequate precaution to guarantee that the transfer was made prior to the effective date of freezing control.

Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e. g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity.

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided,* That no greater interest is created by virtue of the attachment, judgment, etc. than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

Paragraph (5) defines various terms employed in the ruling. For example: the term "transfer" is given a very

comprehensive meaning, excepting only certain types of transfers by operation of the law (e.g., transfer by intestate succession). The term "property" is broad but by and large does not include mere chattels or real property. The term "blocked acount" is in effect limited to accounts actually treated as blocked accounts by the person with whom such account is held or maintained.

Paragraph (6) is technical in character and reserves the full right of the Government to prosecute for violations of the freezing orders and emphasizes that General Ruling No. 12 is not intended to modify outstanding freezing orders, regulations, etc.

8. Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Rulings No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

9. Section 606, Banking Law of the State of New York, as amended Laws 1938, c. 684, §103.

"4. (a) The superintendent may also forthwith take possession of the business and property in this state of any foreign banking corporation, which has been licensed by him under the provisions of this

chapter, upon his finding that any of the reasons enumerated in subdivision one of this section exist with respect to such foreign banking corporation or that it is in liquidation at its domicile or elsewhere. After taking possession thereof the superintendent shall liquidate the business and property of any such foreign banking corporation in accordance with the provisions of this chapter applicable to the liquidation of banking organizations; provided, however, that the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies or whose names appear as creditors on the books of such agency or agencies shall be preferred against the assets of such corporation in this state without prejudice to their right to share in the other assets of such corporation.

(b) Whenever the claims of such creditors, together with interest thereon, and the expenses of the liquidation have been paid in full, the superintendent upon the order of the supreme court shall turn over the remaining assets to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator or receiver of said foreign banking corporation."